Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ELIZABETH WILSON,

Petitioner,

v.

MANPOWER INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Age Discrimination in Employment Act (ADEA), as construed by the Court's decision in *Reeves*, if a terminated employee establishes a *prima facie* case of discrimination, the employer may then produce evidence of a non-discriminatory reason for termination. The terminated employee must then come forward with evidence showing that the claimed non-discriminatory grounds for termination are, in fact, false, or with other evidence establishing discrimination. As previously recognized by Justices O'Connor and Ginsberg in *Reeves*, there is a need "in the appropriate case" for the Court to elaborate more fully the nature and extent of the evidence that a terminated employee must present, after having established a *prima facie* case of discrimination, to attack evidence of non-discrimination produced by an employer, in order to survive a motion for summary judgment.

The questions presented are, what is the nature and extent of the evidence that a terminated employee must produce to overcome an employer's "production" of evidence of non-discriminatory termination in order to avoid summary adjudication. Additionally, did the district court fail to apply this Court's holding in *Reeves* by improperly weighing the evidence, making determinations of credibility, and failing to draw all inferences in favor of the Petitioner in passing upon Respondent's motion for summary judgment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Forrester, D.J.) granting Respondent Manpower International, Inc.'s summary judgment motion (Appendix ("Pet. App.") 3a-32a) is unpublished. The court of appeals' opinion *per curium* is published at 49 Fed. Appx. 288, ___, F.3d ____ (Table). (Pet. App. 1a-2a).

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on September 19, 2002, affirming, *per curium*, the judgment of the district court. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, and 29 U.S.C. § 623, relevant to this petition are reprinted in the Appendix at 20a-21a.

STATEMENT OF THE CASE

At the time of the termination of her employment by Respondent, Petitioner was 59-years old, and Respondent's

Atlanta area manager.[1] Petitioner established the elements of a *prima facie* case of age discrimination, *i.e.*, that she was in the "protected class" of persons, was qualified to be an area manager, was terminated, and was replaced by a substantially younger person. Respondent then produced evidence that Petitioner was terminated for "employee abuse."[2] Petitioner then produced evidence that: Respondent knew that claims of "employee abuse" were likely untrue; that there was no record of the purported "investigation" upon which Respondent claimed to have relied in terminating Petitioner; that Respondent's hiring practices evidenced a statistical bias against older employees; and that despite the alleged "employee abuse" Respondent offered another management position to Petitioner requiring even greater employee contact. Petitioner also produced written direct evidence contradicting Respondent's claim that any actions of Petitioner resulted in "high turnover."

In weighing the evidence the district court held that Petitioner's evidence failed to create a question of fact regarding whether Respondent's stated grounds for termination were pretextual, and discounted the relevance of Petitioner's other evidence, including statistical evidence showing Respondent's age bias in its promotion practices, and granted summary judgment for Respondent. The court of appeals affirmed *per curium*. The holdings below merit this court's immediate review because: (1) as previously

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[1]Responsible for 3 district managers operating 10 offices, and approximately 60 employees.

[2]Respondent's claim of "high turnover" as an additional grounds for termination, which grounds were thereafter credited by the district court, was never claimed as such by Respondent in its discovery responses. Respondent expressly disclosed that the sole ground for Petitioner's termination was "employee abuse."

recognized by Justice Ginsberg in *Reeves v. Sanderson Plumbing Products, Inc.*, (530 U.S. at 154-155, 120 S.Ct. at 2112 (2000)), it may be "incumbent on the Court in an appropriate case," to more precisely prescribe the extent and nature of the evidence required to be produced by a plaintiff/employee to rebut the evidence produced by an employer regarding the claimed non-discriminatory grounds for termination, in order to survive a motion for summary judgment.[3] This is that "appropriate case"; and (2) The district court failed to apply this court's holding in *Reeves, supra,* in that the district court improperly weighed the evidence, made credibility determinations, failed to draw all reasonable inferences in favor of the Petitioner, failed to disregard Respondent's evidence that a jury was not required to believe, and improperly rejected Petitioner's statistical evidence.

(1) Petitioner was born on November 18, 1939. She began employment with Respondent in March, 1993 as a branch manager, became a district manager in 1994, and in 1995 became the area manager for Atlanta, which position she occupied at the time of her termination in January 1999, at the age of 59. She received consistent salary increases in every position she occupied, and her performance appraisals, as well as testimony from her superiors, were uniformly exemplary. Before Petitioner became the Atlanta area manager the performance of that area, including the performance of its personnel, was "dismal at best."[4] Petitioner was expressly instructed by her superiors to address the issue of chronic

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[3]This same concern was voiced by Justice O'Connor in the Court's unanimous opinion at U.S. 148-149, S.Ct. 2109.

[4]Testimony of Petitioner's direct supervisor, Regional Vice President (RVP) Carl Grizzle.

under-performance in the Atlanta area.[5] Personnel turnover had always been very high in Atlanta because Respondent under-compensated its employees, and because of the general nature of the employment marketplace.

As expressly directed, Petitioner implemented Respondent's system in Atlanta, worked tirelessly, accomplished everything that was asked of her, and her performance was equal to or greater than any of the other area managers in Mr. Grizzle's region. Petitioner immediately turned around the Atlanta area producing ". . . exceptional profit production improvement in 1995 over the prior year . . .", which performance " . . . dramatically exceeded corporate performance." The performance of the Atlanta marketplace under Petitioner continued to be exceptional during her tenure which, according to Mr. Grizzle, reflected Petitioner's leadership, business development, staff supervision, and management skills.[6]

As a result of implementing Respondent's programs and directives, some employee "complaints" were received in 1996 and 1997. Mr. Grizzle conducted a full investigation of those "complaints" and found them to be meritless. He communicated his findings directly to his superior, Mr. D. Krueger. Mr. Grizzle also informed Mr. Krueger that, in the two and one-half (2½) years he had worked directly with Petitioner he had never seen any of the characteristics

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[5]Petitioner was instructed, in writing, by RVP Grizzle to "become more aggressive in dealing with your managers . . . not to accept excuses for managers and staff with regard to performance . . . be firm, decisive, make the tough decisions . . . and don't be afraid to hurt somebody's feelings . . . [T]his business is one of profits, not personalities."

[6]Testimony of RVP C.Grizzle.

complained of that had been disproved by the investigation conducted by him, nor had any of Respondent's employees in the Atlanta area ever complained to him of any abusive actions of Petitioner.

In February 1998, because of her exemplary performance record, Petitioner requested consideration for the position of Southeast RVP that had been vacated by Mr. Grizzle. Wilson was then 58 years old. However, Respondent had not promoted anyone over the age of 49 to the position of RVP since at least January 1, 1996, which covered the entire tenure of Respondent's then executive vice-president, T. Hueneke.[7] When Mr. Krueger disclosed Petitioner's interest in the RVP position to Mr. Hueneke, Hueneke's only response was "to smile" according to Mr. Krueger.

In June of 1998, Respondent claimed that additional "complaints" had been received regarding Petitioner's treatment of employees. Those "complaints" were primarily attributed to a district manager under Petitioner, Ms. Priestman.[8] Contrary to Respondent's claims of "employee abuse," and consistent with the results of Respondent's prior investigation by Mr.Grizzle, Ms. Priestman's deposition testimony confirmed that Petitioner: never screamed or yelled, or had any "temper tantrums"; never threw anything; never threatened anyone, never yelled about late or insufficient reports being submitted to her; never touched anyone; and Ms.

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[7]Since January 1996, of six promotions by Respondent to RVP, not one had attained the age of 49. Of 36 people promoted to area manager in that same period, only 3 had reached the age of 50.

[8]Responsible for managing five (5) of Respondent's offices in Petitioner's Atlanta area. Ms. Priestman worked in the same offices as Petitioner.

Preistman was never told by anyone that Petitioner had touched them. Additionally, Petitioner always discussed anything with Ms. Priestman which Ms. Priestman wanted to discuss, and that no one had ever come to Ms. Priestman with a complaint about the Petitioner. On January 13, 1998, after having worked with Petitioner for approximately one (1) year, Ms. Priestman sent Petitioner a card stating: "I am very proud to be a member of your team. You are a pleasure to work with. Sincerely, Geri." Ms. Priestman also agreed to provide an employment recommendation for Petitioner after she had been terminated, and confirmed at the time of her deposition that she was not aware of any reason to terminate Petitioner even one month before Petitioner's termination.

The district court also considered the issue of claimed "high employee turnover" regarding Petitioner's termination, although Respondent had never claimed that Petitioner's termination was related to "high turnover." In any case, turnover was always high in Atlanta because of the nature of the market and Respondent's under-compensation of its employees.[9] Respondent produced no evidence whatsoever of any increase of turnover in the Atlanta area under Petitioner, or, consistent with Ms. Priestman's testimony, to "turnover" in any way related to "employee abuse" by Petitioner. Rather, of the nineteen (19) Atlanta area employees leaving Manpower in 1998, during the twelve (12) months immediately before Wilson's termination, of the sixteen (16) employees indicating a reason for leaving Respondent's employ in job exit interviews, none were related in any way to a claim of "employee abuse."

Respondent claimed that an "investigation" of Respondent was then conducted by its legal department. No

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[9]This was confirmed by the testimony of both Mr. Grizzle and Ms. Priestman.

type of written report or documentation of the purported "investigation" was ever made or exists. Respondent's employees responsible for Petitioner's termination[10] conceded that they had never seen, or known of, any type of written report or "investigation" with regard to the claimed "employee abuse" of Petitioner. Neither had they verified any of the "verbal information" they claimed to have received, despite the fact that the prior investigation conducted by Mr. Grizzle had shown prior claims of "employee abuse" to be wholly without merit.

Petitioner was then told she was being terminated as Atlanta area manager, and offered an alternative position as a district manager (demotion) in North Carolina, which position required more employee contact and supervision then did Petitioner's position as Atlanta area manager. Refusing the demotion, Respondent terminated Petitioner in January, 1999.

(2) The district court held that Petitioner established a *prima facie* case of discrimination pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[11] Petitioner having established a *prima facie* case of discrimination, the district court held that the Respondent had a burden that was "... merely one of production, not persuasion, and it involves no credibility assessment by the Court," of articulating a legitimate non-discriminatory reason

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[10]Mr. T. Hueneke (executive v.p. for North and South America and Asia), Mr. D. Wescoe (v.p. of North American Administration), and Mr. Krueger (v.p. for U.S. operations), all of whom worked in the same office area in Milwaukee.

[11]The district court recognized that this Court has not yet addressed squarely whether the McDonnell Douglas framework is applicable to cases under the ADEA, citing *Reeves*. *See* Pet. App. 7a fn5.

for the termination of the Petitioner, citing *Reeves, supra,* at 142. *See* Pet. App. at 19a. The district court found that Respondent met its burden by offering evidence that Petitioner's termination was based upon chronic employee relations problems attributable to Petitioner "as reflected by the complaints received about her as well as low morale and high turnover in her area." *See* Pet. App. at 19a. As a result, the district court held that the presumption of discrimination arising out of the Petitioner's *prima facie* showing dropped from the case, and Petitioner was required to come forward with "significantly probative evidence that the proffered reason is a pretext for discrimination," and that the Petitioner could do this by "directly persuading the Court that [Respondent] more likely was motivated by a discriminatory reason or by indirectly showing that [Respondent's] explanation is not believable." *See* Pet. App. at 19a-20a.

At this juncture in its reasoning, the district court analyzed the Court's holding in *Reeves* (Pet. App. 20a, fn9). The district court stated as follows:

> A plaintiff's *prima facie* case in conjunction with evidence sufficient to allow a reasonable fact finder to find that the defendant's asserted reason is false, **may** support a determination that the defendant unlawfully discriminated against the plaintiff. 530 U.S. at 148 (2000). [Emphasis in original.]
>
> Prior to the decision in *Reeves*, the Eleventh Circuit had held that judgment as a matter of law was unavailable to a defendant once the plaintiff had presented sufficient evidence of pretext as to each of the defendant's legitimate, articulated reasons. *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir.

> 1997). In *Chapman* en banc, the Eleventh Circuit recognized that *Reeves* modified its previous decision in *Combs* such that judgment as a matter of law and summary judgment sometimes will be available to a defendant in such a case. *Chapman*, 229 F.3d at 1025 n.11. Thus, pursuant to *Reeves* a plaintiff may not be entitled to take her case to a jury even if she presents sufficient evidence that the defendants articulated reasons are pretextual. *Id.* This conclusion flows from the caveat in *Reeves* that a sufficient showing of pretext will not **always** entitle a plaintiff to a jury verdict in her favor. 530 U.S. at 148.
>
> The Court in *Reeves* recognized that there would be instances where despite the plaintiff's evidence of pretext sufficient to reject the defendants explanation for the challenged employment action, "no rational fact finder could conclude that the action was discriminatory." *Id.* The Court posited that: [f]or instance, an employer would be entitled to [summary judgment] if the record conclusively revealed some other, non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

The district court then identified ten (10) factual issues regarding which Petitioner had presented evidence relevant to the Respondent's stated grounds for termination being pretextual, and, thereafter, proceeded to weigh the evidence

and make determinations of credibility. *See* Pet. App. 20a-18a. Following this process, the district court entered summary judgment for Respondent, dismissing the claims of Petitioner. *See* Pet. App. 31a.

(3) On Respondent's appeal, the Eleventh Circuit affirmed the district court's order of summary judgment, *per curium*.

(4) This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for three reasons. *First*, in ADEA actions the Court has recognized the need for elaboration regarding the nature and extent of the evidence that a terminated employee must produce to overcome an employer's mere "production" of evidence of non-discriminatory treatment, in order to avoid summary adjudication.

Second, the existing uncertainty invites confusion developing regarding the role of the district courts in weighing the evidence, making determinations of credibility, and applying the obligation to draw all inferences in favor of employees, when considering employees' evidence of discrimination, contrary to the historic standards of summary adjudication.

Third, by improperly weighing the evidence, making determinations of credibility, and failing to draw all inferences in favor of the Petitioner, the district court failed to properly apply the standards of summary judgment to the ADEA proceedings below.

I. In ADEA cases, the Court has recognized the need

for further elaboration of the evidentiary burdens of plaintiff employees when defendant employers have produced evidence of non-discriminatory treatment, in order to avoid summary adjudication.

The Court's holding in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed 2d 668 (1973), and subsequent decisions, have "established an allocation of the burden of production and an order for the presentation of proof in...discriminatory-treatment cases." *Reeves*, supra at U.S. 142, S.Ct. 2106. The first step is for the employee to establish a *prima facia* case of discrimination. *Ibid.* If a *prima facia* case is established, the burden shifts to the employer to "produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Ibid.* However, the employer's burden is one of production, not persuasion, and it can involve no credibility assessment. *Ibid.* If the employer satisfies this burden, the presumption of discrimination arising from the *prima facia* case disappears. *Reeves* at U.S. 143, S.Ct. 2106. If the employer produces such evidence, the plaintiff employee is afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Ibid.*

In further elaborating on the three-part test of *McDonnell Douglas*, and to address a conflict between the circuits in the application of the test, the Court in *Reeves* addressed the import of evidence produced by a plaintiff-employee tending to show, or infer, that the grounds for termination advanced by the employer were not credible, and therefore could be rejected by the trier of fact. As held by the Court in *Reeves*, evidence established that the employer's justification for its actions was eliminated, making it

"permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves* at U.S. 149, S.Ct. 2108, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742 (1993).

Writing for a unanimous Court in *Reeves*, Justice O'Connor recognized that the nature and extent of the evidence required to be produced by an employee in order to avoid summary adjudication was uncertain, requiring a balancing of the burdens under the ADEA, and the standards of summary adjudication.[12] Justice O'Connor then set forth examples of the nature and extent of the evidence that an employee would be required to provide, in addition to a *prima facia* case, in order to rebut the evidence of non-discriminatory treatment produced by an employer. *Reeves* at U.S. 147-149, S.Ct. 2108-2109. However, Justice O'Connor reasoned that the Court did not have to address this issue in *Reeves*, stating that "[F]or purposes of this case, we need not-and could not-resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law." *Reeves* at U.S. 149, S.Ct. 2109.

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[12]Analogizing the standards of a Rule 50 motion with proceedings for summary judgment under Rule 56, a court must review the record "taken as a whole." A court must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh the evidence. Rather, credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts, are jury functions, not those of a judge. Although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe, i.e., the court should give credence to the evidence favoring the nonmovant, as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Reeves* at U.S. 150-151, S.Ct. 2110.

Justice Ginsberg, in a concurring opinion, agreed that this issue required further review, stating: "I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. *Reeves* at U.S. 154, S.Ct. 2112. Justice Ginsberg further stated: "...it follows that the ultimate question of liability ordinarily should not be taken from the [trier of fact] once the plaintiff has introduced the two categories of evidence described above.[13] Because the Court's opinion leaves room for such further elaboration in an appropriate case, I join it in full." *Reeves* at U.S. 154-155, S.Ct. 2112.

It is therefore clear from the stated reasoning of the Court in Justice O'Connor's unanimous opinion in *Reeves*, and in the concurrence of Justice Ginsberg in that case, that a further review of this issue is required in order to avoid further confusion, and conflict, arising out of the application of appropriate standards under the ADEA by the lower courts.

II. The existing uncertainty invites the district courts to weigh the evidence, make determinations of credibility, and to fail to draw all inferences in favor of employees when considering an employee's evidence of discrimination, contrary to the standards of summary adjudication.

The Court has recognized the significant difficulties the lower courts have experienced regarding the applicability of the proper standards to ADEA claims coming before them.

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[13]I.e., evidence of a *prima facia* case, and evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false.

See, e.g., *Reeves* at U.S. 141-142, S.Ct. 2105-2106. The difficulty in applying the standards, and the remedial intent and purpose of the ADEA, is recognized to be that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes...". *Reeves* at U.S. 141, S.Ct. 2105, citing *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed 2d 403 (1983).

After the employee's prima facia case is established, the employer has the burden only of producing, not persuading, with the evidence it advances in support of its claim for non-discriminatory treatment of the employee. The employer is further benefited by the fact that the evidence produced, even though not required to persuade, is subject to no assessment of credibility. *Reeves* at U.S. 142, S.Ct. 2106. It is then up to the employee to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves* at U.S. 143, S.Ct. 2106.[14]

It is in the melding of the burden of employees being obligated to "prove by a preponderance of the evidence" that the reasons offered by the employer were not its true reasons, but were a pretext for discrimination, with the legitimate protections provided to litigants pursuant to Rules 50, and 56, that confusion necessarily arises. Given the present state of the law, confusion must arise out of the conflict between the employee being obligated to "prove by a preponderance of the evidence" elements of the employee's claim regarding summary adjudication proceedings, when the very standard of such proceedings requires that the district court must draw all

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[14]Citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. At 1089 (1981).

reasonable inferences in favor of the nonmoving party, not make credibility determinations or weigh the evidence, and must disregard all evidence favorable to the moving party that the jury is not required to believe, recognizing that such functions are for the jury, not a judge.

The result of these apparently conflicting standards is that lower courts will invariably develop conflicting caselaw and derivative "standards." Both employees and employers need a well defined and coherent standard to be applied by the district courts regarding this critical area of the law.

III. By improperly weighing the evidence, making determinations of credibility, and failing to draw all inferences in favor of Petitioner, the district court failed to properly apply the standards of summary judgment.

The district court below first applied the *McDonnell Douglas* format, and found that Petitioner had established a prima facia case. Pet. App. 12a-19a.[15]

In accordance with the *McDonnell Douglas* format, the district court then determined that Respondent had produced evidence, not subject to a credibility assessment, that Petitioner had been terminated for "employee abuse," which the district court concluded to also include "high

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[15]The district court's characterization of the five years and eight months age difference between Petitioner and her ultimate replacement as "gossamer" (Pet. App.18a) has no support in the controlling caselaw, as recognized by the district court itself in its opinion. That caselaw notes that an age difference of only three years satisfies this element of a *prima facia* case. Pet. App. 15a-18a.

turnover." Pet. App. 16a. The district court then identified ten separate evidentiary issues regarding which Petitioner had come forward with evidence relating to Respondent's grounds for termination being pretextual, as well as statistical evidence tending to show Respondent discriminated on the basis of age regarding its promotions to RVP, and to area manager positions. The district court then proceeded to review, weigh, and make credibility determinations with regard to each of these factual issues and, in the process of that exercise, failed to draw the inferences that could properly be made from such evidence in favor of the Petitioner in passing upon Respondent's motion for summary judgment. Pet. App. 21a-32a.

The disputed factual matters need not be stated at length. However, with regard to pretext, it is undisputed that Respondent conducted an earlier full investigation regarding claims of "employee abuse" and found such claims to be untrue. It is also undisputed that Respondent claimed that its ultimate termination of Petitioner in January, 1999, resulted from an "investigation" of charges of "employee abuse" in 1998, but produced no record whatsoever of any such "investigation" ever having been conducted. The testimony of Ms. Priestman, upon whom Respondent primarily relies, was directly contrary to claims of "employee abuse." Finally, Respondent offered to transfer Petitioner to a district manager's position which entailed greater, rather than less, interaction with subordinates.

In the face of this substantial evidence the district court stated: "Even if this established pretext with respect to [Respondents] explanation that it discharged [Petitioner] due to complaints about 'employee abuse,' it does not undermine [Respondent's] argument that it also took the challenged employment action because of the high turnover in [Petitioner's] area." Pet. App. 30a. The district court

therefore clearly inferred that a question of fact existed with regard to "employee abuse." As a result, the district court turned to the issue of "high turnover." Pet. App. 30a-31a. However, the district court's cursory review of the objective evidence regarding Respondent's claim of "high turnover" was flawed in that the district court ignored the fact that the actual investigation conducted in 1997 by Mr. Grizzle showed "complaints" against Petitioner to be meritless,[16] and the objective written evidence contained within each of the sixteen exit interviews of departing Manpower employees conducted by Respondent over the entire year of 1998, established that none of those employees indicated they were leaving Manpower because of Petitioner's "employee abuse." Moreover, since Respondent claimed, and the district court opined, that "employee abuse" resulted in "high turnover," the fact that the written exit interviews contradicted this position at the least infers to the contrary, i.e., since the evidence shows that "employee abuse" was not a factor in turnover, it may be reasonably inferred that there was no "employee abuse."

Additionally, there is no evidence that turnover rates were any higher under Petitioner than at any prior, or later, time. To the contrary, both Mr. Grizzle and Ms. Priestman testified that turnover in the Atlanta area was always high, primarily as a result of Respondent's under-compensation of its employees. Petitioner therefore came forward with significant relevant evidence regarding Respondent's claims of "employee abuse," and "high turnover," meeting each "face-on," and creating clear questions of fact as to each.[17]

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[16]They could therefore not have resulted in "high turnover."

[17]The fact that Petitioner voiced a concern regarding turnover in Atlanta, is entirely consistent with her historic attitude as a high-achieving employee, and does not mean that turnover

Finally, the district court rejected the statistical evidence of Respondent's promotion practices on the basis that such statistics needed a further "analytic foundation." Pet. App. 23a-26a. Importantly, the statistical evidence produced by Petitioner related only to the *promotion* practices of Respondent, which were wholly within the control of Respondent. At the summary judgment stage of proceedings it may reasonably be inferred that virtually all of the Respondent's management personnel had an interest in being promoted to higher positions. However, of six promotions to RVP since January 1, 1996, not one was awarded to a person over the age of 49. Similarly, of 36 people who became area managers during that time, only three had reached the age of even 50. While it may be reasonable to require further "analytic foundation" with regard to individuals leaving employment, since factors other than those totally under Respondent's control may arise, such is not the case with regard to promotion practices. Therefore, applying the standards of summary judgment, all reasonable inferences regarding such statistical evidence should have favored the Petitioner.

The order of the district court therefore establishes that the district court improperly weighed the evidence, made determinations of credibility, and failed to draw all inferences in favor of the Petitioner when considering Respondent's motion for summary judgment, contrary to the standards for such proceedings.

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issues were in fact higher, or attributable to her actions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15764

D. C. Docket No. 99-03371-CV-JOF-1

ELIZABETH WILSON,

Plaintiff-Appellant,

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versus

MANPOWER INTERNATIONAL, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(September 19, 2002)

Before ANDERSON and CARNES, Circuit Judges, and HAND*, District Judge.

PER CURIAM:

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*Honorable William Brevard Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

AFFIRMED. See 11th Cir.R. 36-1.[1]

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[1] 11th Cir. R 36-1 provides:

When the court determines that any of the following circumstances exit:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELIZABETH WILSON,	:	
	:	CIVIL ACTION
Plaintiff,	:	FILE
vs.	:	
	:	NO. 1:99-cv-3371-JOF
MANPOWER	:	
INTERNATIONAL, INC.	:	
	:	
Defendant.	:	

JUDGMENT

This action having come before the court, Honorable J. Owen Forrester, United States District Judge, for consideration of defendant's motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed**.

Dated at Atlanta, Georgia, this 26th day of September, 2001.

LUTHER D. THOMAS
CLERK OF COURT

By: _____S/_____
Andrea Gee, Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
September 26, 2001
Luther D. Thomas
Clerk of Court

By: _____S/_____
Andrea Gee, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELIZABETH WILSON,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	NO. 1:99-CV-3371-JOF
	:	
MANPOWER INTERNATIONAL, INC.,	:	
	:	
Defendant.	:	

ORDER

This matter is before the court on Defendant's motion for summary judgment [24].

I. Statement of the Case

A. Procedural History

Plaintiff, Elizabeth Wilson, filed the instant action against Defendant, Manpower International, Inc., contending that it unlawfully discharged her on the basis of her age in violation of the Age Discrimination in Employment Act, 29

U.S.C. § 621, *et. seq.* ("ADEA").[1] Defendant timely has filed a motion for summary judgment, asserting that Plaintiff has not established a *prima facie* case of age discrimination or that Defendant's legitimate nondiscriminatory reasons are pretextual. Plaintiff responds that she has established a *prima facie* case of discrimination and that material questions of fact remain as to the issue of pretext.[2]

B. Facts

The following facts are undisputed pursuant to Local Rule 56.1B.[3] Defendant is an employee staffing company

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[1]Plaintiff originally filed the instant action against both Manpower and Douglas Krueger and asserted a multitude of claims. This court allowed Plaintiff to amend her complaint to dismiss Krueger as a defendant and to dismiss all of her claims except for her ADEA claim.

[2]Plaintiff's response to Defendant's motion for summary judgment was 29 pages in length and contained more than 10 characters per inch and thus is not in compliance with Local Rule 7.1D, N.D. Ga. Nevertheless, the court elects to consider Plaintiff's response.

[3]Pursuant to Local Rule 56.1, the court will not consider any fact statements or responses offered by the parties that constitute issues or legal conclusions. *See* LR 56.1B(1), N.D. Ga. Additionally, those of Defendant's fact statements that are not specifically controverted by evidence in the record are deemed

whose philosophy is to "treat people with respect 100 percent of the time, period." Defendant hired Plaintiff in March 1993 to be its Branch Manager in Salisbury, North Carolina. By December 26, 1994, Plaintiff had been promoted to the position of District Manager in North Carolina.[4] Subsequently, Defendant's Southeast Regional Vice President ("RVP"), Carl Grizzle, recommended Plaintiff for the vacant position of Area Manager in Atlanta, Georgia, and after interviewing with Terry Hueneke, Defendant's Executive Vice President, and Douglas Krueger, Defendant's Vice President for U.S. Operations, Plaintiff received the promotion effective April 3, 1995. She was 55 at the time; her date of birth is November 8, 1939. (Pl. Dep., p. 5). The Atlanta area's growth trend in revenue and

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admitted by Plaintiff. *See* LR 56.1B(2-3), N.D. Ga.

[4]Defendant's management structure, as pertinent to the instant case, is as follows:

Vice President - U.S. Operations
Regional Vice President
Area Manager
District Manager
Branch Manager
Service Representative

profit continued under her management.

Defendant received numerous complaints from employees relating to Plaintiff's abusiveness while she was Atlanta Area Manager. Such complaints alleged that employee turnover was a problem, that morale was horrible, and that Plaintiff (1) verbally abused them, (2) was the reason that they were resigning, (3) employed poor management tactics and had poor people skills, (4) was not objective, (5) threw temper tantrums during meetings, (6) was crazy, negative, and degrading to the staff, (6) did not keep conversations confidential, and (7) was unprofessional, micromanaging, and intimidating. In a memorandum to Plaintiff dated March 28, 1997, Grizzle instructed Plaintiff to refrain from micromanaging her subordinates and staff. He advised her to develop greater listening skills and informed her that he had heard her make questionable comments and that several people had brought to his attention comments that she had made. In addition, Defendant paid for Plaintiff to attend a seminar on how to

supervise people.

Defendant suspended Grizzle in late 1997 and discharged him in early 1998. Krueger then began serving as the acting Southeast RVP in addition to his other corporate responsibilities. In a memorandum dated June 4, 1998, Krueger informed Plaintiff that he continued to hear "inferences" from the Atlanta staff of their discontentment and their perception of lack of positive leadership and reinforcement from her. He reminded her to be supportive and to be the leader of the team.

In addition, in a memorandum to Plaintiff dated October 14, 1998, Krueger discussed staff turnover from January through August 1998, and he informed her that her annualized turnover rate of 94% over one year was "significantly higher than the Country" and that it was "difficult if not impossible to grow a market with turnover his high." In a reply memorandum, Plaintiff challenged Krueger's turnover figures and contended that the turnover rate was 66.7%, but she admitted that even under her revised rate, "turnover was too

high." Krueger met with Plaintiff and discussed the high turnover in Atlanta that began when Plaintiff came to Atlanta in 1995. He informed her that Defendant's average annual turnover was 40% to 50% and that Defendant had "higher expectations" of the Atlanta market. Krueger informed Plaintiff that unless things improved, he would have to "make a change" in Atlanta.

Despite the concerns expressed by Grizzle and Krueger, Plaintiff did nothing to change her management style. In the latter part of 1998, Krueger recommended that an investigation be conducted into the situation in Atlanta and that Plaintiff be relieved of her duties. He brought the matter to Hueneke's attention. Hueneke also had been informed by Human Resources about the complaints concerning Plaintiff. David Wescoe, Defendant's Vice President of North America Affairs, dispatched Christine McLaughlin and Kathleen Marcott from Defendant's Human Resources Department to investigate the situation. McLaughlin and Marcott interviewed, among others,

Plaintiff, who spent five hours with McLaughlin and Marcott.

After the results of the investigation were presented to him, Hueneke decided that Defendant should give Plaintiff two options: (1) return to North Carolina as District Manager or (2) leave the company in exchange for a severance package including six months' compensation, her company car, and other benefits. Plaintiff was presented with these two options on January 8, 1999. Plaintiff elected to take the severance package. When a dispute arose as to whether the severance package contemplated that Plaintiff sign a release of claims, Defendant increased its offer to seven months' pay in exchange for the release. In a letter dated February 16, 1999, Plaintiff's attorney stated that Plaintiff would accept this offer. However, after subsequent communications, the parties failed to consummate an agreement. As a result, Plaintiff was separated from the company.

Plaintiff's former job of Atlanta Area Manager remained vacant for approximately 20 months. On September 25, 2000,

Defendant hired Kathy Taylor, age 55, to fill the position. Taylor's date of birth is July 28, 1945. (Johnston Aff., ¶6).

II. Discussion

The ADEA prohibits an employer from discharging or otherwise discriminating against an individual with respect to the compensation, terms, conditions, or privileges of her employment on the basis of her age. 29 U.S. C. § 623(a). Plaintiff admits that she has no direct evidence of age discrimination. Instead, she relies on circumstantial evidence and therefore must establish a *prima facie* case of discrimination by showing that she (1) was a member of the statutorily protected age group between the ages of forty and seventy, (2) was qualified for the job, (3) was subjected to an adverse employment action, and (4) was replaced by someone substantially younger.[5] *Chapman v. AI Transport*, 229 F.3d

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[5]In ADEA cases, the Eleventh Circuit uses the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to evaluate claims based upon circumstantial evidence. *Chapman*, 229 F.3d at 1024. The Supreme Court, however, has not

1012, 1024 (11th Cir, 2000) (en banc); *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 999), *cert. denied*, 529 U.S. 1109 (2000); *see also Stamey v. Southern Bell Tel. & Tel. Co.*, 859 F.2d 855, 859 (11th Cir. 1988).

There is no dispute that Plaintiff was within the protected age category at the time her cause of action arose or that she was qualified for the position that she held. Therefore, this court turns to whether Plaintiff has established the remaining two elements of her *prima facie* case. Defendant contends that Plaintiff has not shown that she was terminated or discharged as claimed in her pleadings and that she cannot now expand her theory of the case to encompass the broader concept of "adverse employment action." Defendant further asserts that Plaintiff was not replaced by someone substantially younger because her replacement was only four years younger

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addressed squarely whether the *McDonnell Douglas* framework is applicable to cases under the ADEA. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

than Plaintiff was at the time Plaintiff left Defendant's employ.

A. Adverse Employment Action

The court finds that this case is similar to *Stamey*, in which the plaintiff's job position had been eliminated and the defendant offered her early retirement or a transfer to another job. 859 F.2d at 858. The defendant did not specify what alternative job the plaintiff might take, but it advised her that whatever job she took would pay less. *Id.* The plaintiff never learned what the other potential jobs were, and in light of the defendant's subsequent actions, she ultimately chose to take early retirement. *Id.* The plaintiff filed suite against the defendant under the ADEA, claiming, among other things, that she unfairly was terminated on the basis of her age. *Id.* At 857. The jury found in favor of the plaintiff on her termination claim and the defendant appealed. *Id.*

In the instant case, once the parties were unable to reach an agreement concerning the options offered to Plaintiff, Plaintiff was separated from the company. The court finds that,

as in *Stamey*, a jury could determine that this constituted a discharge or termination of Plaintiff's employment. Thus, Plaintiff has established the third element of her *prima facie* case.

B. "Substantially Younger" Replacement

The court first notes that despite the initial impression that the age difference between Plaintiff (who as 59 at the time that her cause of action arose) and her replacement, Kathy Taylor (who was 55 when she replaced Plaintiff) is only four years, the actual age difference according to their dates of birth is five years and eight months. In addition, the court notes that the fact that Plaintiff was replaced by a person within the protected age group does not result in an absolute bar to her establishment of a *prima facie* case. *See Eskra*, 125 F.3d at 1411 ("In an ADEA action, the plaintiff is not required to show that the replacement employee was under the age of 40, and outside the protected class."); *see also City of Miami*, 870 F.2d at 583 (eschewing overly strict formula for establishing the

elements of a *prima facie* case, especially in age discrimination cases). Instead, this prong is to be tailored to the individual facts of the case, with the inquiry being whether an ordinary, reasonable person could infer discrimination if the facts presented remained unrebutted. *Id.* For example, in *City of Miami*, the court held that viewing the evidence in the light most favorable to the plaintiff, who was 49 when discharged, the plaintiff had established a *prima facie* case of age discrimination when she had shown that she was replaced by a 46-year-old. *Id.* at 579-80, 583; *see also Damon*, 196 F.3d at 1360 (five-year age difference); *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1003 (11th Cir. 1997) (per curiam) (three-year age difference).[6]

In its reply to its motion for summary judgment, Defendant asserts that *City of Miami* is factually distinguishable

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[6]The Court notes that in its motion for summary judgment, Defendant cites no Eleventh Circuit authority to support its argument that Taylor was not a "substantially younger" replacement; instead, Defendant cites authority from other circuits in support of its argument. Eleventh Circuit authority is controlling on this issue.

from the instant case because in *City of Miami*, the defendant had made a derogatory comment about the protected class.[7] Indeed, in *City of Miami*, there was testimony that the decisionmaker had told his sixty-two-year-old Jewish secretary that he "did not want his office run by 'little old Jewish ladies' like his mother-in-law." 870 F.2d at 580. In contrast, no such evidence has been introduced in the instant case. However, the court does not find this to be a controlling distinction. First, the comments in *City of Miami* was not directed to the plaintiff, and the plaintiff admitted that she perceived the comment to be

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[7]Defendant also has cited a case decided by this court, *Waldemar v. American Cancer Soc'y*, 971 F. Supp. 547 (N.D. Ga. 1996) (Forrester, J.), in support of its position on the "substantially younger" issue. *Waldemar* involved a failure to hire claim concerning a position for which three people were candidates: the plaintiff, age 59; the person awarded the position, age 54; and a third candidate, age 42. *Id.* at 558. This court found that Plaintiff had failed to show a *prima facie* case of age discrimination because the person awarded the position was twelve years older than the youngest candidate and only five years younger than the plaintiff and because the youngest was not awarded the job. Thus, this court in *Waldemar* essentially found that no reasonable person could infer discrimination if the facts presented remained unrebutted. *Id.* Therefore, the court finds that *Waldemar* is not inconsistent with *City of Miami*. Of course, to the extent that *Waldemar* can be construed as being inconsistent with *City of Miami* and its progeny, Eleventh Circuit precedent is controlling.

aimed a **religion and not age**. *Id.* at 582. Second, and most importantly, in finding that the plaintiff had presented a *prima facie* case of age discrimination, the Eleventh Circuit held that viewing the evidence in the light most favorable to the plaintiff, she **at least had shown that she was replaced by a younger person**. *Id.* At 583. Accordingly, it appears that the age difference was the pivotal factor to the appellate court.

Because of this precedent, this court finds that the circuit would find that Plaintiff has established one fourth element of her *prima facie* case. *See Damon*, 196 F.3d at 1360; *DecisionOne*, 122 F.3d at 1003; *City of Miami*, 870 F.2d at 583. However, the court notes that even though Plaintiff has established a *prima facie* case under a mechanical application of *McDonnell-Douglas*, the difference in the ages is so small that any inference of discrimination that can be raised is gossamer.[8]

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[8]Gossamer: infinitely or exquisitely light, delicate, or tenuous. Webster's New International Dictionary 981 (3d ed. 1981).

C. Pretext

Because Plaintiff can be said to have established a *prima facie* case of age discrimination, the burden now shifts to Defendant to articulate a legitimate nondiscriminatory reason for its actions concerning Plaintiff. *Chapman*, 229 F.2d at 1024. This burden is merely one of production, not persuasion, and it involves no credibility assessment by the court. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). Defendant has offered evidence that its actions were based on chronic employee relations problems attributable to Plaintiff as reflected by the complaints received about her as well as morale and high turnover in her area. The court finds that Defendant has met its burden and that the presumption of discrimination drops from the case. *See id.; Chapman*, 229 F.2d at 1024. Plaintiff now must come forward with "significantly probative evidence that the proffered reason is a pretext for discrimination." *City of Miami*, 870 F.2d at 584. She may do this by directly persuading the court that Defendant more likely

was motivated by a discriminatory reason or by indirectly showing that the employer's explanation is not believable.[9]

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[9]A plaintiff's *prima facie* case in conjunction with evidence sufficient to allow a reasonable factfinder to find that the defendant's asserted reason is false, **may** support a determination that the defendant unlawfully discriminated against the plaintiff. *Reeves*, 530 U.S. at 148 (2000). Prior to the decision in *Reeves*, the Eleventh Circuit had held that judgment as a matter of law was unavailable to a defendant once the plaintiff had presented sufficient evidence of pretext as to each of the defendant's legitimate, articulated reasons. *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997). In *Chapman*, an *en banc* Eleventh Circuit recognized that *Reeves* modified its previous decision in *Combs* such that judgment as a matter of law and summary judgment sometimes will be available to a defendant in such a case. *Chapman*, 229 F.3d at 1025 n. 11. Thus, pursuant to *Reeves*, a plaintiff may not be entitled to take her case to a jury even if the she presents sufficient evidence that the defendant's articulated reasons are pretextual. *Id.* This conclusion flows from the caveat in *Reeves* that a sufficient showing of pretext will not **always** entitle a plaintiff to a jury verdict in her favor. 530 U.S. at 148. The Court in *Reeves* recognized that there would be instances where despite the plaintiff's evidence of pretext sufficient to reject the defendant's explanation for the challenged employment action, "no rational factfinder could conclude that the action was discriminatory." *Id.* The court posited that

> [f]or instance, an employer would be entitled to [summary judgment] if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id.

Id.

In support of her argument that Defendant's articulated reasons for the challenged employment action are pretextual, Plaintiff contends that: (1) the complaints against her were untrue; (2) Grizzle and Krueger knew that they were untrue; (3) she was an exemplary employee with outstanding revenue and profit results; (4) statistical evidence shows that Defendant discriminates on the basis of age; (5) Grizzle instructed her to be aggressive in her job; (6) the timing of several of Defendant's recent hires evidences pretext; (7) there was no written report of the investigation conducted by McLaughlin and Marcott; (8) there was a one-year lapse in complaints; (9) the offer to become District Manager is suspect in light of the claims of "employee abuse" because a District Manager interacts with the lower level employees more often than does an Area Manager; and (10) no one discussed their concerns about her actions with Plaintiff. For the reasons set forth below, the court finds that Plaintiff has not presented this court

with sufficient evidence of pretext and that therefore her case does not survive Defendant's motion for summary judgment.

1. Attempts to Second-Guess Defendant's Business Judgment

In order to establish that Defendant's reasons for the challenged employment decisions were pretextual, Plaintiff must meet Defendant's proffered reasons "head on" and cannot show pretext merely by questioning the perspicacity of Defendant's business judgment. *Chapman*, 229 F.2d at 1030. Some of Plaintiff's arguments purporting to evidence pretext merely are attempts to show that she was not abusive to her employees. However, it is irrelevant to the determination of pretext whether the complaints against Plaintiff were true; all that matters is that Defendant believed that the complaints were true and was motivated by them. *See Elrod v. Sears Roebuck & Co.*, 929 F.2d 1466, 1470 (11th Cir. 1991) ("We can assume..that the complaining employees...were lying through their teeth."). In addition, Plaintiff's argument that she was an exceptional Area Manager who continually posted superb performance results

and received three raises during her tenure as Atlanta Area Manager does not undermine Defendant's stated concerns regarding the complaints it received about Plaintiff's abusive behavior and the high level of turnover in the Atlanta are. *See Chapman*, 229 F.3d at 1031 ((finding that plaintiff's good performance appraisals and loyalty to client did not undermine defendant's stated concern precipitating employment action). Instead, such evidence amounts to an attack on the wisdom of Defendant's actions and does not constitute evidence of pretext.

2. Statistical Evidence

Plaintiff also attempts to present informal statistical evidence of pretext. She argues that since January 1, 1996, not one of the six promotions from Area Manager to RVP was awarded to a person age 50 or older. (Hueneke Dep., p. 92; Krueger Dep., Ex. 2 at 0358). She points to evidence that of the 36 people who have become Area Managers since January 1, 1996, only three have reached the age of 50. (*Id.* at 105; Krueger Dep., Ex. 2 at 0360-0363). Finally, she cites evidence

that between January 1, 1996 through May 2, 2000, fourteen Area Managers over the age of 50 ended their employment with Defendant. (Hueneke Dep., Ex. 62).

Statistical evidence may be used to demonstrate pretext. *Brown v. American Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir. 1991). However, statistics without analytic foundation mean nothing. *Id.* The first problem with Plaintiff's proposed evidence of pretext is that she has provided this court with no evidence of the factors or qualifications that Defendant looked at in making the promotions to RVP and Area Manager, nor has she presented evidence as to who applied for such promotions or was interested in those jobs. In addition, with respect to those employees who ended their employment with Defendant, Plaintiff has provided this court no evidence of the reason why their employment ended - that is, whether they were terminated by Defendant or voluntarily retired. In short, Plaintiff has provided this court with no context for her figures such that the data do not constitute sufficient evidence that

Defendant's proffered reasons for its actions are pretextual. *See Lee v. GTE Fla., Inc.*, 226 F.3d 1249, 1255 n. 2 (11th Cir. 2000), *cert. denied,* 121 S. Ct. 1486 (2001) (finding data to be statistically meaningless because the plaintiff "has provided no specific context against which to measure these briefs facts"); *Watkins v. Sverdrup Tech., Inc.*, 153 F.3d 1308, 1314-15 (11th Cir. 1998) (finding data lacked specificity, sufficient depth, and probative value to constitute evidence of pretext); *Brown*, 939 F.2d at 952 (finding that statistics regarding racial discrimination do not "say a great deal about [defendant's] practices unless we know how many blacks have applied and failed and compare that to the success rate of equally qualified white applicants.").

Plaintiff's second problem with this data is that it does nothing to undermine Defendant's articulated reason for the challenged employment action. At the pretext stage, Plaintiff's evidence must rebut directly Defendant's evidence that it discharged Plaintiff due to employee complaints about her and

due to the high level of turnover in her area. *See Chapman*, 219 F.3d at 1030. Plaintiff's data regarding the promotions and separations from the company, however, are in no way tied to the actions taken by Defendant with respect to Plaintiff. For example, they do not show that younger employees about whom Defendant had received numerous complaints had not been discharged from the company while older similarity-situated employees had been discharged. Thus, Plaintiff's data would not amount to evidence of pretext even if it had analytic foundation.

3. Timing of New Hires

Plaintiff argues that Defendant did not hire her replacement until 20 months after her discharge and one day after the close of discovery in the instant case. She further asserts that of the three individuals over the age of 50 to become Area Manager since January 1, 1996, one was Barb Bononi, who was 60 years old when she was hired and was hired four days after Plaintiff's suit was filed. In addition,

Plaintiff asserts that Ms. Bononi was an "outside" hire, in contravention of the company's policy of promoting from within. Again, however, Plaintiff has not tied the timing or nature of these actions to the stated reason for her discharge. "Standing alone, deviation from a company policy does not demonstrate discriminatory animus." *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355-56 (11th Cir. 1999) (per curiam). The fact that a person over age 50 eventually replaced Plaintiff and/or was hired from the outside to become an Area Manager does not discredit Defendant's stated reasons that its actions toward Plaintiff were based on the complaints it received about her abusive behavior and the high level of turnover in her area.

4. Lapse Between Complaints

Plaintiff argues that there was a one-year lapse between the last complaint received while Grizzle was Southeast RVP and the first complaint received while Krueger was acting as temporary Southeast RVP. The court finds that this evidence is not significantly probative of pretext as it does nothing to

undermine Defendant's stated reasons for its actions. Plaintiff does not deny that complaints were made while Grizzle was Defendant's Southeast RVP. Plaintiff does not deny that Krueger later received complaints while acting as Southeast RVP. Thus, the fact that there was a lapse in time between the first batch and the second batch of complaints received does not cast doubt on the fact that Defendant received numerous complaints about Plaintiff and acted on the basis of these complaints.

5. Knowledge of Veracity of Complaints

Plaintiff contends that Grizzle and Krueger knew that the complaints received about her while Grizzle was Southeast RVP were untrue. Indeed, the record supports her contention that Grizzle either discounted the complaints or investigated them and found them to e meritless and communicated his conclusions to Krueger. Grizzle Dep., pp. 181-182; 191-97. However, Krueger did not always believe everything as Grizzle interpreted it. Krueger Dep., p. 157. Furthermore, Krueger

received additional complaints **after** Grizzle was fired and recommended that an investigation be conducted into the complaints. Thereafter Krueger took no part in the investigation of or decisions pertaining to Plaintiff. Krueger Dep., pp. 48-49; 54; 69-70; Hueneke Dep., pp. 75-78.

Pursuant to the results of the investigation conducted by McLaughlin and Marcott, **Hueneke** made the decision to remove Plaintiff as Atlanta Area Manager. Plaintiff has provided no evidence that **Hueneke** disbelieved the complaints filed about Plaintiff. As such, Plaintiff has not presented any evidence that the **decisionmaker** did not believe that there was a problem regarding Plaintiff's treatment of her subordinates. Likewise, Plaintiff's argument that Defendant's asserted reasons are pretextual because there is no documented written report of the investigation does not undermine the evidence that Hueneke believed the oral report presented to him and acted on the basis of that report.

6. Remaining Arguments Directed to Claims

that Plaintiff was Abusive.

Plaintiff's assertions that she merely was following Grizzle's instructions about how to act as Area Manager and that no one discussed their concerns about her actions with her are belied by her own admissions. Both Grizzle and Krueger discussed with Plaintiff the fact that complaints had been made about her and advised her to be more supportive and less micromanaging of her subordinates.

Plaintiff attests that the offer to transfer her to District Manager in North Carolina evidences pretext because this job would entail more interaction by her with subordinates. Wilson Aff., ¶ 19. Even if this established pretext with respect to Defendant's explanation that it discharged Plaintiff due to complaints about "employee abuse," it does not undermine Defendant's argument that it also took the challenged employment action because of the high turnover in Plaintiff's area.[10] Plaintiff argues that turnover always was high in her

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[10]Plaintiff's only "evidence" of turnover in Atlanta prior to her becoming the Atlanta Area Manager is testimony to the effect

area but has provided this court with no evidence of the turnover history in the Atlanta area prior to her becoming the Area Manager. On the other hand, Plaintiff admitted that the turnover figure was 66.7% during at least part of her tenure as Atlanta Area Manager, a figure which even she acknowledged was too high.

Accordingly, because Plaintiff has failed to discredit **both** legitimate, nondiscriminatory reasons proffered by Defendant, the court finds that Defendant's motion for summary judgment must be GRANTED. *See Chapman*, 229 F.2d at 1024-25 (instructing that if the plaintiff does not offer sufficient evidence that **each** of the defendant's legitimate articulated reasons is pretext, then the defendant is entitled to summary judgment); *see also Watkins*, 153 F.3d at 1317 n.18 (finding that because the plaintiff had not shown evidence of

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that turnover always had been very high in Atlanta and that there is a lot of turnover in the temporary services industry. Grizzle Dep., p. 60-61; Priestman Dep., pp. 42-45. Plaintiff, however, has presented this court with no evidence of the actual turnover rate in the Atlanta area before she assumed the Atlanta Area Manager position.

pretext for one of the defendant's proffered reasons, the court did not need to discuss the defendant's remaining proffered reasons for its actions).

III. Conclusion

In accordance with the foregoing, Defendant's motion for summary judgment [24-1] is GRANTED.

SO ORDERED this 25th day of September 2001.

S/
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

Entered on Docket
September 26, 2001
by LDT Clerk
Deputy Clerk

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 14–AGE DISCRIMINATION IN EMPLOYMENT

29 U.S.C. § 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that–

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens, commerce and the free flow of good in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find

ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 623. Prohibition of age discrimination.

(a) Employer practices

It shall be unlawful for an employer–

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Remainder of statute inapplicable.